United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7515

United States Court of Appeals

FOR THE SECOND CIRCUIT

RAUL GONZALEZ,

Plaintiff-Appellee,

—against—

ALBERT SHANKER, ANNE MERSEREAU, LEONARD LURIE, ADOLPH ROHER, RICHARD LEE PRICE, JEROME GOODMAN, CAROLYN KOZLOWSKY, MARTIN RUBIN, KENNETH CAROSELLA, GARY SOUSA, HARRY LASSER, ROGER BRAVERMAN, LORRAINE SPIVACK, IRVING ANKER, JOSEPH MONSERRAT, STEPHEN AIELLO, JOSEPH G. BARKAN, ROBERT CHRISTEN, AMELIA ASHE, JAMES F. REGAN, ISAIAH ROBINSON, THE UNITED FEDERATION OF TEACHERS, SOL LEVINE, GEORGE FESKO and MAX GREEN,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Docket No. 75-7515

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Was the District Court correct in holding that plaintiff is not required to exhaust remedies created by a

collective bargaining agreement before commencing a Civil Rights action in the federal courts?

2. Was the District Court correct in holding that the plaintiff is not required to exhaust the remedies afforded by Section 310 of the Education Law of the State of New York before commencing such an action?

3. Was the District Court correct in holding that the remedies afforded plaintiff by the collective bargaining agreement and Section 310 of the Education Law were inadequate for the determination of his claims and need not be exhausted by plaintiff before commencing such an action?

4. Was the District Court correct in holding that the plaintiff adequately stated claims against all defendants?

PRELIMINARY STATEMENT

This is an appeal, pursuant to the provisions of 28 U.S.C. §1292(b) and F.R.A.P. Rule 5, 28 U.S.C., by all of the defendants in this action from an order of the United States District Court for the Southern District of New York, the Hon. Whitman Knapp presiding, dated July 31, 1975, denying the motions of all defendants seeking dismissal of the action.

STATEMENT OF THE CASE

This action was brought for declaratory judgment, injunctive relief and damages by plaintiff Raul Gonzalez, the Puerto Rican principal of Junior High School 60M located in Community School District No. 1 in Manhattan. Gonzalez sued governmental defendants, including the Community Superintendents of School District No. 1, certain members of the Community School Board for District No. 1, the Chancellor and the individual members of the Central Board of Education of the City of New York, certain employees of the Central Board, certain school personnel (also members of the United Federation of Teachers) and private defendants, including the United Federation of Teachers ("UFT") and certain officers and employees, charging all of them with violations of his rights under the First and Fourteenth Amendments of the United States Constitution and under 42 U.S.C. §§1981 and 1983. In brief, plaintiff claimed that because he is Puerto Rican, favored a slate of minority group candidates in School Board elections and refused to cooperate with the UFT in its campaign against this slate, and is outspokenly committed to a program of bilingual education, reform and community participation identified with the minority group slate, he has been subjected to a deliberate, continuing and discriminatory program of harassment, interference and non-cooperation in the performance of his duties as principal of J.H.S. 60M.

Plaintiff further alleged that all defendants with the exception of the Chancellor and the individual members of the Board of Education have conspired in violation of 42 U.S.C. §1985(3) to deprive him of the equal protection of the laws and from exercising his rights as a citizen. Gonzalez additionally alleged that all defendants, having knowledge of the conspiracy and some or all of the acts in furtherance thereof, and having the power to prevent or aid in preventing it, failed or neglected to do so to his injury, entitling him to relief under 42 U.S.C. §1986.

Jurisdiction is predicated on 28 U.S.C. §§1343 and 2201.

Pursuant to Rule 12(b)(6), F. R. Civ. P., all defendants moved to dismiss the complaint. The District Court, in a sixteen-page Memorandum and Order supplemented by eight pages of footnotes (A. 138-161),*/ denied defendants' motions. In so ruling, the Court found that plaintiff's claim was ripe for adjudication (A. 154); that the complaint sufficiently and with particularity alleged a substantial interference by defendants with plaintiff's civil rights (A. 143, 151-152); and that the complaint sufficiently alleged activity on the part of the "private" UFT defendants

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*/ References to the Joint Appendix are noted as (A. ___).

in conjunction with governmental officials and defendants to bring the "private" defendants within the ambit of 42 U.S.C. §1983 (A. 152-153). Most important for this appeal, the Court ruled that "In view of the hesitancy with which this Court clings to the exhaustion of administrative remedies doctrine, we find no basis for extending the principle to the type of contractual remedies here involved," to wit, remedies under a collective bargaining agreement (A. 147).

The Court further found that such remedies were "woefully inadequate" to the tasks of fact-finding and the resolution of constitutional claims asserted in this action (A. 149), and that the remedy afforded by §310 of the Education Law of New York need not be exhausted (A. 146-147).

Pursuant to 28 U.S.C. §1292(b) the District Court certified the "question whether plaintiff should be required to exhaust remedies" to the Court of Appeals (A. 153). By this Court's orders of September 2, 1975, leave to appeal and a stay pending determination of the appeal were granted all defendants (A. 162-163).

STATEMENT OF FACTS

Plaintiff, a United States citizen of Puerto Rican descent, is employed as Principal of Junior High School 60M in

Community School District One by the Board of Education of the City of New York (A. 5). The student population of plaintiff's school and of the district is predominantly Puerto Rican with significant Black and Oriental minorities (A. 11). Reading scores achieved by students in District One have been among the lowest in the City (A. 12). The District is densely populated. Its proportion of unemployed adults, welfare recipients and low-income families is among the highest in the City (A. 11).

The governance of School District One in the last several years has been the subject of heated controversy, and elections for School Board membership in District One have been acrimoniously contested (A. 12). One such election has been overturned by the United States District Court for the Southern District of New York which noted the existence of an "atmosphere of intense racial hostility" in the District (A. 13). As alleged in the complaint (A. 12-14), the white Community Board majority, elected through the support of, and dominated by, the United Federation of Teachers, both before and after the new election ordered by the District Court, set about reversing the educational policies of the former community-based board and upon a program of dismissing personnel who were either Puerto Rican or "identified" with the former board.

Prior to the 1973 School Board elections, plaintiff was approached by defendant officials and representatives of the UFT and asked to cooperate with them in the elections and in their plans for the district (A. 14-15). Gonzalez refused and was threatened that if a UFT-dominated school board majority were to be elected, it would make it difficult for him to continue to function as a principal in the district (A. 15).

As alleged in paragraph 30 of the Complaint (A. 15), this threat, motivated by racial animus and the intention to punish plaintiff for the exercise of his First Amendment rights, has been carried out. Gonzalez alleges that he has been subjected to a deliberate and continuing program of interference, harassment and denial of cooperation in the performance of his duties as principal of J.H.S. 60M (A. 15-16), and that non-Puerto Rican principals as well as principals favored by the UFT have not been so abused.

At paragraph 31 of his complaint (A. 16-22), plaintiff set forth, inter alia, fourteen detailed illustrations of the extensive program of harassment, interference and non-cooperation engaged in by defendants. Defendants have denied plaintiff's school adequate staff commonly given other schools (Complaint, ¶31(i), (j)); they have harassed him by requiring him to submit lengthy, time-consuming and redundant reports and explanations (Complaint, ¶31(d)); they have

reversed established practice in withholding a scheduled painting of plaintiff's school (Complaint, ¶31(c)); they have permitted a fire hazard to exist in plaintiff's school despite his protests (Complaint, ¶31(e)); they have assaulted plaintiff's reputation in the community and among his fellow professionals (Complaint, ¶31(l), (m);) they have subjected him to repeated and meaningless inspections (Complaint, ¶31(e)); they have denied him access to his superiors and to Board of Education personnel employed to assist him in his work (Complaint, ¶31(g), (h)); they have undermined his achievement of educational goals (Complaint, ¶31(b), (c), (d), (e), (g), (h), (i), (j)) and his authority in his school's administration (Complaint, ¶31(a), (k), (l), (n)); and have encouraged the disloyalty of his faculty and staff (Complaint, ¶31(l), (n)) (A. 16-22). Importantly, it is alleged that these examples merely illustrate a continuing and comprehensive course of activity. It has been carried forward by the UFT-dominated school board elected on May 6, 1975 and by the defendant Lurie, the Community Superintendent chosen by the board, an outspoken supporter of the UFT (Complaint, ¶4 A. 5-6; Gonzalez affidavit A. 127).

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF IS NOT REQUIRED TO EXHAUST HIS ADMINISTRATIVE AND COLLECTIVE BARGAINING AGREEMENT REMEDIES, AND THAT, IN ANY EVENT, THE REMEDIES AVAILABLE TO PLAINTIFF ARE INADEQUATE

The defendants have urgently advanced the recent Second Circuit opinion in Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975) as dispositive of the instant case. Such insistence obscures actuality. Emphatically, Fuentes' remedies, the equivalents of those provided in the New York Education Law, Section 2590-j(7) (A. 159) and Section 2573(7), are not available to plaintiff. Judge Knapp considered at length the remedies which were available to Gonzalez in light of the decision in Fuentes v. Roher, supra, and unequivocally rejected defendants' contention that such remedies need be exhausted (A. 144-151).*/

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*/ Defendants are incorrect when they assert that Fuentes was required to exhaust the remedies available to him "despite the fact that Fuentes had been removed from his position as superintendent." (UFT Appellants' Brief, p. 29). In fact, in Fuentes, where a preliminary injunction had been sought, this Court refrained from staying the administrative hearings because Fuentes had been suspended from his position as a consequence of serious, colorable charges brought against him. Fuentes v. Roher, supra, at 382. The administrative body thus had a substantial interest in being able to expeditiously remove an apparently unsatisfactory employee. Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 1651 (1974).

The existence and nature of these charges, utterly absent in the present case, were regarded in Fuentes, as "crucial to the issues raised on this appeal," creating as they did the basis for the

A. The District Court Correctly Held That Plaintiff Is Not Required to Exhaust Remedies Created By a Collective Bargaining Agreement.

Defendants' briefs drift in cavalier manner between state administrative remedies and the remedies created by a collective bargaining agreement as though no distinction were recognized by the law. This is not the case and it is of great significance that the remedies substantially in issue here are provided by a collective bargaining agreement, in the negotiation of which plaintiff played no part, and which bear no resemblance to, nor any significant attributes of, any existing state administrative remedies.

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*/ (Cont'd. from Page 9)

necessary exercise of the Board's disciplinary function in the case of an individual regarded as unfit for his position. This Court's action then was in the nature of an abstention or a finding that the administrative action, not yet having resulted in Fuentes' formal dismissal, was not sufficiently concretized to justify intervention. Such a finding was consistent with the concern that the federal courts not intervene with the functioning of administrative bodies where such bodies have primary responsibility -- in Fuentes' case for determining the validity of charges brought against an employee where that body was equipped with constitutionally adequate procedures for doing so.

In the case at bar, Gonzalez has not sought to preliminarily arrest administrative function. Pending the ultimate disposition of Gonzalez' action, the charade of administrative procedure perpetrated by the defendants to harass him, will continue, as will its effects which are "concretely" felt by Gonzalez on a daily basis.

Plaintiff contends, and Judge Knapp concluded, that in view of the hesitancy with which this Circuit clings to the exhaustion of remedies doctrine, there is no basis for extending the principle to the type of contractual remedies here involved.*/ Indeed, the relevant authorities preclude such an extension of the exhaustion doctrine (A. 147-148).

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*/ Defendants overstate the scope and solidity, in this Circuit, of the rule requiring the exhaustion of administrative remedies prior to institution of a Civil Rights Action.

In the first place, the case usually cited as initial authority for the rule, Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) has since been acknowledged by this Court as basically a "rate making" case,

> [w]here the issue raised was whether the maximum level of rents set by a New York City District Rent and Rehabilitation Director was so low as to deprive a landlord of property without due process of law. This is essentially a rate making issue in which courts are inclined to defer to administrative bodies' expertise. Plano v. Baker, 504 F.2d 595, 599, n. 6 (2d Cir. 1974).

Secondly, recent suggestions that the rule persists, have been tentative:

> . . . this court, albeit with some hesitation, see Plano v. Baker, supra, at 597, has continued to require exhaustion of administrative remedies. Fuentes v. Roher, supra, at 386.

This Court has acknowledged that statements in various Supreme Court opinions have cast doubt on the requirement, Plano v. Baker, supra, at 597; and has avoided reexamination of the exhaustion rule by finding available remedies inadequate, Id.; or by qualifying the requirement by exceptions presented where the question of the adequacy of the administrative remedy is for all practical purposes coextensive with the merits of the plaintiff's constitutional claims, Fuentes v. Roher, supra, at 387.

Remedial procedures created by a collective bargaining agreement were not involved in Plano v. Baker, supra, or Fuentes v. Roher, supra, and this Court thus was

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*/ (Cont'd. from Page 11)

Thirdly, here plaintiff has complained of final and irrevocable violations of his constitutional rights which have caused him injury. This Court, in a case requiring exhaustion, has acknowledged that

> . . . fears may be entertained with respect to an exhaustion requirement in situations where a plaintiff is already suffering an injury, . . . Blanton v. State University of New York, 489 F.2d 377, 383 (2d Cir. 1973).

Fourthly, it is submitted that the rule in this Circuit must be viewed restrictively in light of the uninterrupted line of Supreme Court cases indicating the general rule "that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. Section 1983." Gibson v. Berryhill, 411 U.S. 564 at 574 (1973); McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); King v. Smith, 392 U.S. 309 (1968); Houghton v. Shafer, 392 U.S. 639 (1968); Wilwording v. Swenson, 404 U.S. 249 (1971); Carter v. Stanton, 405 U.S. 669 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973); Steffel v. Thomson, 415 U.S. 472 1974); Allee v. Medrano, 94 S. Ct. 2191 (1974); Ellis v. Dyson, 43 L.W. 4615 (1975); Monroe v. Pape, 365 U.S. 167 (1961).

Additionally, it is worth noting that the power of the federal courts to abstain in actions brought under the Civil Rights Act is narrowly circumscribed:

> At least in actions under the Civil Rights Act the power of a federal court to abstain from hearing and deciding the merits of claims properly brought before it is a closely restricted one which may be invoked only in a narrowly limited set of "special circumstances." Zwickler v. Koota, 389 U.S. 241, 248 (1967); cf. Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188-189 (1959). In enacting the predecessor to Section 1983 Congress early established the federal courts as the primary forum for the vindication of federal rights, and imposed

not required to, and did not, in deciding those cases, consider last year's Supreme Court decision in Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974). Alexander raised the question whether an employee's utilization of a grievance procedure provided by a collective bargaining agreement waived his cause of action under Title VII of the Civil Rights Act of 1964. Justice Powell, writing for a unanimous Court, comprehensively and unequivocally rejected such grievance and arbitral procedures as unsuitable for the resolution of statutory or constitutional issues and held

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*/ (Cont'd. from Page 12)

> a duty upon them to give "due respect" to a suitor's choice of that forum. Zwickler v. Koota, supra, 389 U.S. at 247-248. As a consequence it is now widely recognized that "cases involving vital questions of civil rights are the least likely candidates for abstention." Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967). See also, McNeese v. Board of Education, etc., 373 U.S. 668, 672-674, Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968). (footnotes omitted)

Fifthly, it cannot fairly be inferred that the intent of the Congress of the United States is to require an aggrieved individual to resort to remedies which are created by a collective bargaining agreement before his Civil Rights complaint may be heard by a federal court, where it has not been Congress' intent to require exhaustion of the more comprehensive, adequate and objectively administered remedies it has created under Title VII of the Civil Rights Act of 1964. Long v. Ford Motor Co., 496 F.2d 500, 503-504 (6th Cir. 1974); Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971), cert. denied, 405 U.S. 916, 92 S. Ct. 931, 30 L.Ed.2d 785 (1972); Young v. International Tel. and Tel. Co., 438 F.2d 757, 761-763 (3d Cir. 1971); Waters v. Wisconsin Steel Works of International Harvestor Co., 502 F.2d 1309, 1315 (7th Cir. 1974).

that the employee's Title VII rights had not been waived. This discussion compels the conclusion that had Alexander invoked his Title VII remedy first, he would not have been turned away for failure to exhaust remedies under the collective bargaining agreement.

Upon the authority of Alexander, the Sixth Circuit has concluded:

> Plaintiff's claim, however, is for discrimination in employment, and is not based on the collective bargaining agreements, but is brought under Title VII. Such claim is not barred because of failure to pursue remedies under the collective bargaining agreement. [Emphasis supplied.] Thornton v. East Texas Motor Freight, 497 F.2d 416, 426 (6th Cir. 1974).

The issue decided by the Sixth Circuit in Thornton is identical to the one faced by this Court in the instant case once it is recognized that Title VII and 42 U.S.C. §1981 and §1983, while not co-extensive, substantially overlap and are given consistent interpretive content. Alexander v. Gardner-Denver Company, supra, at p. 47.

> It is well established that under Title VII there is no exhaustion of contractual remedies requirement.
>
> . . .
>
> We are of the view, therefore, that that plaintiffs could properly proceed against the union under Section 1981 without first exhaust-

> ing any contractual remedies under the collective bargaining agreement. Waters v. Wisconsin Steel Works of International Harvester Co., supra, at 1316.

Grievance and arbitral procedures, while they may be suited to the resolution of contractual disputes, do not provide an appropriate forum for the resolution of rights under the Civil Rights Acts. The responsibility of the arbitrator is to effectuate the intent of the parties rather than constitutional or legislative requirements.

> [T]he specialized competence of arbitrators pertains primarily to the law of the shop not the law of the land. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand the resolution of statutory or constitutional issues is a primary responsibility of the courts . . . Alexander v. Gardner-Denver Company, supra, at p. 57. (citations omitted)

The issue in grievance and arbitration proceedings under the collective bargaining agreement would be whether the actions of which the plaintiff complains are in violation of the agreement, not of the Federal Constitution. Byrd v. Local Union No. 24 Int. Bro. of Electrical Workers, 375 F.Supp. 545, 564 (D.C. Md. 1974). It is beyond argument that the procedures established under the Agreement between the Board of Education and the Council of Supervisors and Administrators, urgently invoked by defendants here, do not relate to the enforcement

of federal constitutional rights. The proper forum for the vindication of such rights is the federal judiciary, not the grievance and arbitration procedures set forth in the collective bargaining agreement. McNeese v. Board of Education, supra.

B. The District Court Correctly Held That the Specific Remedies Available to Plaintiff Are Inadequate.

Judge Knapp concluded that plaintiff has alleged facts showing intentional and purposeful deprivation of plaintiff's civil rights by the defendants (A. 143, 151-152). Plaintiff is minimally entitled to a forum empowered and equipped to determine the questions of fact and resolve the constitutional issues raised by his allegations and empowered, as well, to redress his injuries.

The primary forum for the vindication of federal constitutional rights is the federal judiciary. McNeese v. Board of Education, supra, p. 673; Byrd v. Local Union No. 24, 375 F.Supp. 545 (D.C. Md. 1974). Against this standard, Judge Knapp carefully measured the remedies claimed to be available to plaintiff before concluding that they were

"woefully inadequate" to the task of resolving the claims of this plaintiff (A. 144-151).*/

Articles X and XI of the C.S.A. contract (A. 105-115) define the only contractual remedies available to Gonzalez. Article X proceedings deal exclusively with the interpretation and application of the C.S.A. contract. Articles X and XI both provide for informal discussions, conferences and investigations as well as permissive rather than mandatory submissions to arbitration. Indeed, the objective of Article XI is "informal resolution" (A. 112). The grievant is expressly denied representation of counsel at various stages. On the other hand, the C.S.A., closely associated with and supportive of policy of the UFT in the district and regarded by plaintiff as extremely hostile to his interest,**/ is guaranteed an opportunity to participate. In fact, a C.S.A. designee would be responsible for carrying plaintiff's case at certain stages. Arbitration decisions are advisory only and do not bind the Community or Central Boards. The powers of the arbitrator under Article XI (A. 115) are severely limited and he expressly may not exercise any of the powers conferred upon

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*/ There is neither statutory basis nor case authority for defendants' apparent assertion that the inadequacy of administrative remedies must be pleaded in a complaint based upon the Civil Rights Acts (UFT appellants' brief, p. 26).

**/ See affidavit of Raul Gonzalez dated June 24, 1975. (A. 126-127). See also, Memorandum and Order (A. 150).

trial examiners by Section 2590j(7)(f) of the Education Law, */ including the following:

> The trial examiner shall administer the oath to all appropriate witnesses. A trial examiner shall have the power to subpoena witnesses, papers and records. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a trial examiner as authorized by this subdivision. §2590j(7)(f), N.Y. Education Law.

So far as appears on the face of the Contract and so far as practice reveals, the collective bargaining agreement remedies available to plaintiff are utterly lacking in procedural attributes that would assure either accurate fact-finding or satisfactory resolution of constitutional claims -- particularly against the background of animosity and abuse in this action. In addition to denial of counsel and compelled representation by a designee of a union hostile to him at certain stages, plaintiff is denied the rights and procedures common to civil trials. Compulsory process for the production of witnesses, papers and records is not available. Discovery procedures available to parties pursuant to Rules 26-37, F. R. Civ. P., are not available. Testimony is not taken upon oath

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*/ These were the powers, the equivalents of which the Second Circuit deemed adequate to resolve the controversy in Fuentes v. Roher, 519 F.2d 379 (2d Cir. 1975).

at crucial stages and no provision is made for cross-examination of witnesses; the usual rules of evidence do not apply and the records of proceedings are incomplete. The fact-finding process available is simply not the equivalent of judicial fact-finding. Alexander v. Gardner-Denver Company, supra, at 57.*/ Rather, there are proceedings apparently designed to bar the public laundering of the dirty wash that accumulates between the Board of Education and the collective bargaining agents of its employees.

Additionally, the presiding authority at these proceedings is not empowered to adequately remedy plaintiff's complaint. He cannot award money damages for past wrongs as are here claimed. The arbitrators' determinations are not

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*/ Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts. . . . [A] standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make de novo determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights. Id., at 58. (footnote omitted)

binding even within the framework of the proceedings themselves. No determinations would be enforceable against the private defendants. The UFT defendants here, closely associated with the C.S.A. as discussed at page 17, supra, indirectly derive the benefit of the contractual provision providing for C.S.A. presence whether desired by plaintiff or not. On the other hand, since they are "private" parties and not parties to the agreement pursuant to which these proceedings would be held, they have no obligation to participate in them and they are no way bound by the outcome.

Moreover, as Judge Knapp observed, "whatever guidance, if any, such an arbitrator could give the court on these constitutional issues, would be clearly limited by the inadequate fact-finding procedures available. See Plano v. Baker, supra, 504 F.2d 599." (A. 151). When federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary. McNeese v. Board of Education, supra, at 676; see Hillsborough v. Cromwell, 326 U.S. 620, 625-6 (1946).

Measured against the standards defined by existing case law, the remedies available to plaintiff here are plainly inadequate to remedy the alleged constitutional wrongs. Plano v. Baker, 504 F.2d 595 (2d Cir. 1974) (a Section 1983 action alleging dismissal of probationary teacher for activity

protected by the First Amendment) comprehensively treats the issues raised by the defendants' motions to dismiss.

There, the District Court for the Northern District of New York relying, as do defendants here, upon this Court's decisions in Eisen v. Eastman, supra, and Blanton v. State University of New York, 489 F.2d 377 (2d Cir. 1973) dismissed Plano's complaint for failure to exhaust state administrative remedies.

The Court of Appeals reversed and remanded on the grounds that the administrative remedy was inadequate because, inter alia, "the constitutional issues raised by this case particularly in the First Amendment area, lie within the expertise of the courts, not the expertise of administrators." Plano v. Baker, supra, at 599.

Secondly, the remedies available were found inadequate to resolve the factual dispute. The Court, referring to procedures governing appeals to the Commissioner of Education under Section 310, Education Law*/ (A. 159) (the appeal

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*/ The overwhelming weight of authority within the State of New York is that Section 310 provides merely an alternative remedy, and failure to appeal to the Commissioner of Education does not bar application for judicial relief. Lorenz v. Board of Education, 264 N.Y. 591 (1934); Matter of Frankle v. Board of Education, 285 N.Y. 541 (1941); Garber v. Board of Education, 50 Misc.2d 711, 271 N.Y.S.2d 329 (1966); Cardinale v. Andersen, 75 Misc.2d 210, 347 N.Y.S.2d 284 (1973); Greve v. Board of Education, 72 Misc.2d 791, 339 N.Y.S.2d 697 (1973), aff'd. 43 A.D.2d 851, 351 N.Y.S.2d 715; Harran Transp. Co. v. Board of Education, 71 Misc.2d 139, 335 N.Y.S.2d 465 (1972); Ferraro v. City School Dist., 69 Misc.2d 800, 331 N.Y.S.2d 490 (1972) (noting that the appeal is voluntary rather than mandatory, in any event). It would be anomalous for a federal court to require the exhaustion of a state remedy in a civil rights action when the courts of that state have concluded that failure to invoke the same remedy does not bar judicial relief.

available to Gonzalez after the contractually provided proceedings) indicated that the proceedings there denying the right of examination and cross examination of witnesses, could not be considered adequate for purposes of the exhaustion rule. The Fourteenth Amendment due process clause affords one who is a party in an administrative proceeding the opportunity to cross-examine witnesses. Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 93; Freight Consolidators Cooperative, Inc. v. United States, 230 F.Supp. 692, 699 (S.D.N.Y. 1964).

Citing James v. Board of Education, 461 F.2d 566, 569 (2d Cir. 1972), cert. den. 409 U.S. 1042 (1972), the Court noted that the hearing "was no more than an informal round table discussion between the Commissioner, the parties and their attorneys. No transcript of the proceedings was made." Plano v. Baker, supra, at 598 n. 5.

That a fact-finding hearing had not been held by the dismissing Board in Plano v. Baker, supra, and one superficially appears to be available to plaintiff here, does not alter a whit the application of the principle of Plano to the instant matter. As indicated at pages 16-20, supra, the proceedures under the C.S.A. collective bargaining agreement suffer procedural deficiencies that make them wholly inadequate for the redress of the constitutional wrongs plaintiff

has alleged. The insufficiency of fact-finding procedures would render an already incomplete record meaningless for purposes of review.

Thirdly, the Second Circuit weighed the fact that as plaintiff here, Plano sought damages for a conspiracy to violate his civil rights, which the administrator could not award. "[E]xhaustion of state administrative remedies in Section 1983 actions is not required where the administrator is not empowered to grant the relief sought." Plano v. Baker, supra, at 599; Ray v. Fritz, 463 F.2d 586 (2d Cir. 1972).

Any action within the authority of the administrator here would still have left plaintiff unrecompensed for his injuries.*/ It would be anomalous to conclude that such remedy forecloses prior suit in the federal courts when its result would merely compel plaintiff to seek damages in a state court action that would have no such effect, since the exhaustion of state judicial remedies is clearly not required. McNeese v. Board of Education, supra, at 675; Monroe v. Pape, supra; see Lane v. Wilson, 307 U.S. 268, 274 (1939).

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*/ Gonzalez' situation in regard to this point is more compelling than Plano's because the procedures available do not, in any event, reach the UFT defendants as discussed at page 20, supra.

A noteworthy concluding irony arises in connection with defendants' contention that for each of the alleged continuing, repeated and intensifying acts of multiple defendants, plaintiff should be required to invoke the first step, second step and arbitration procedures of Article X of the collective bargaining agreement, and the administrative and arbitration procedures of Article XI of that agreement as well as the right of appeal to the Commission of Education under Education Law, Section 310, as his "speedy and effective" remedy. Were this Court to sustain that contention, it would condemn this plaintiff to the endless preparation for, processing of and participation in proceedings to the exclusion of his work and other activity. That is exactly what defendants have sought through their program of harassment, interference and denial of customary cooperation.

POINT II

THE DISTRICT COURT CORRECTLY HELD THAT THE COMPLAINT STATED ACTIONABLE CLAIMS AGAINST ALL DEFENDANTS

In their motions to dismiss, all defendants contended that plaintiff's claim was not "ripe" for adjudication, apparently operating under the novel theory that so long as they stopped short of firing plaintiff, defendants were

free to abuse and harass him without fear that he might be entitled to redress before the federal courts. Judge Knapp gave that contention short shrift:

> . . . the defendants suggest that because plaintiff has not been discharged, this case is not "ripe" for adjudication. Dismissal, however, is not the only form of racial discrimination in employment that the Civil Rights statutes can redress. The Civil Rights Acts apply as well to discriminations with respect to the terms and conditions of employment. (citation omitted) Memorandum and Order, footnote 1. (A. 154)

Nonetheless, in muted form, this contention courses through the briefs submitted by appellants to this Court. What the defendants appear to be proposing to the Court is a de minimis theory regarding the protection of violated constitutional rights, the substance of which proposal is that if defendants have violated plaintiff's constitutional rights but have not fired him, plaintiff's rights are entitled to less than full protection.

Without conceding that defendants' violations are anything but gross and substantial, it is submitted that their theory is simply unfounded in law. There is nothing in the language of §1983 or the First or Fourteenth Amendments to support such a limitation on a right of action under §1983,

contrary as it is to the encompassing tone of that section, which, as Justice Harlan described it in his concurring opinion in Monroe v. Pape, 365 U.S. 167, 196, 81 S. Ct. 473, 489, is "one of overflowing protection of constitutional rights."

> There is no justification for the incorporation of a de minimis rule by way of a limitation on the right of action by an individual for an admitted violation of constitutional rights. There is no warrant for any separation of constitutional rights into redressable rights and non-redressable rights, of major and minor unconstitutional deprivations, and Section 1983 makes no such distinction and authorizes no such separation. By its very terms it applies indiscriminately to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Pritchard v. Perry, 508 F.2d 423, 425 (4th Cir. 1975);

Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Michigan 1975).

A. Plaintiff Has Sufficiently Alleged Discrimination Constituting A Denial of the Equal Protection of the Laws.

Although outright denial of employment is often the basis for an action in the equal protection area, other

forms of discrimination in the terms and conditions of employment are recognized by the federal courts. See, e.g., Boudreaux v. Baton Rouge Marine Contracting Company, 437 F.2d 1011 (5th Cir. 1971), (desirable jobs were reserved for white workers while "dirty work" and work requiring heavy lifting were always assigned to members of a black union local); Young v. International Tel. and Tel., 438 F.2d 757 (3d Cir. 1971), ("since Plaintiff's admission to Union, it and employer harassed plaintiff wantonly and maliciously in retaliation for his enforcing his rights to join union and pursuant to a policy of discrimination against black employees"); Long v. Ford Motor Company, 496 F.2d 500 (1974) ("[w]hen an employer, public or private, places stringent requirements on employees because of their race, Section 1981 is violated").

These cases suggest analogies to the prohibitions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(a), which prohibits racially based employment discrimination, regardless of nature, see Waters v. Wisconsin Steel Works of Int. Harvester Co., 502 F.2d 1309, 1316 (7th Cir. 1974); and to actions in which housing discrimination has been alleged under 42 U.S.C. §§1981 and 1982 as well as under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et. seq., (the Fair Housing Act). See, e.g., Newbern v. Lake Lorelei, Inc., 308 F.Supp. 407 (S.D. Ohio 1968), ("The 13th Amendment, as well as the Civil Rights Act of 1866 (42 U.S.C. §1981 et. seq.) 'nullifies sophisticated as well as simple-

minded modes of discrimination.' Lane v. Wilson, 307 U.S. 268 (1939)." supra, at 416), and United States v. Pelzer Realty Company, Inc., 484 F.2d 438 (5th Cir. 1973), rehearing denied, 486 F.2d 403. (It was discriminatory to require black purchasers to find additional purchasers or to bear the closing costs when white purchasers were not similarly burdened.)

While the Civil Rights Act of 1866 (42 U.S.C. §1981 et. seq.) and Title VII of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 are not coextensive as to the classes of persons protected (the later acts being, in this respect, much the broader) it is submitted that the classes of discriminatory acts reached are the same under the earlier and later acts. Cf. Waters v. Wisconsin Steel Works of Int. Harvestor Co., supra, at 1316.

B. Plaintiff Has Sufficiently Alleged That He Is Being "Punished" For His Exercise of His Constitutional Rights of Free Expression and Association Under the First and Fourteenth Amendments.

In paragraph 30 of the Complaint (A. 15-16), plaintiff claims violations by defendants of his rights of free expression and association in that the acts complained of were directed against him by the defendants because he was committed to a program of "bilingual education, . . . educational

reform and parent and community participation identified with Superintendent Fuentes and the 'Community' slate" and because he supported the Community slate in the school board elections.

Government officials

> [m]ay not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations his exercise of these freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. Perry v. Sinderman, supra, 408 U.S. 593, 597 (1972).

See also, Keyishian v. Board of Regents, 385 U.S. 589, 605-6 (1967); Shelton v. Tucker, 364 U.S. 479, 485-6 (1960). This general principle has been applied most often to denials of public employment. United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947); Wieman v. Updegraff, 344 U.S. 183, 192 (1952); Shelton v. Tucker, supra; Torcaso v. Watkins, 367 U.S. 488, 495-496 (1961); Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961); Cramp v. Board of Public Instruction, 368 U.S. 278, 288 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Elfbrandt v. Russell, 384 U.S. 11, 17 (1966); Keyishian v. Board of Regents, supra; Whitehill v. Elkins, 389 U.S. 54 (1967); United States v. Robel, 389

U.S. 258 (1967); Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

This has not precluded suit where defendants' actions were designed to punish the exercise of First Amendment rights and stopped short of the firing of plaintiff. See, Young v. International Tel. and Tel., supra; Hayes v. Henlopen School District, 341 F.Supp. 823, 836 (D. Delaware 1972) (complaint alleging that the firing of Mrs. Hayes was motivated by the spiteful and revengeful attitude toward her husband's participation in Board-teacher contract negotiations held sufficient. Additionally, the Court held that Mr. Hayes "stated a cause of action under Section 1983 since he alleges the deprivation of his right to freedom of speech by reason of his wife's dismissal. His allegations, if proven would constitute an actionable claim.")

Given the historically broad sweep of coverage and the rule of liberal interpretation of the Civil Rights Acts and 42 U.S.C. §§1981 and 1983*/, the scrupulous protection afforded First and Fourteenth Amendment constitutional rights under them,

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*/ 42 U.S.C. §1983 is to be interpreted liberally. See, Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966); Green v. Dumke, 480 F.2d 624 (9th Cir. 1973); Batista v. Weir, 340 F.2d 74 (3d Cir. 1965). 42 U.S.C. §1981 is to be liberally construed in racial employment discrimination cases. See, Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied 405 U.S. 916; Young v. International Tel. and Tel. Co., 438 F.2d 757 (3d Cir. 1971); Johnson v. Goodyear Tire & Rubber Company, 349 F.Supp. 3 (1972).

and the wide variety of wrongful actions brought under their purview by case law as demonstrated, supra, it cannot possibly be that plaintiff here has failed to set forth a cognizable claim.

Although articulated in the context of Title VII, Civil Rights Act of 1964, comments of Judge Goldberg of the Fifth Circuit have application here:

> . . . Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. Rogers v. Equal Employment Opportunities Commission, 454 F.2d 234, 238 (5th Cir. 1971).

C. The United Federation of Teachers Is A "Person" Within the Meaning of 42 U.S.C. §1983.

The UFT appellants' brief baldly asserts at page 45 that:

> . . . the United Federation of Teachers, an unincorporated association, is not a "person" within the meaning of the statute. 42 U.S.C. §1983.

None of the case law cited, however, offers any authority for that proposition.

In fact, cases cited by the UFT at page 45 while supporting the general requirement of "state action" in §1983 cases (the Court dismissing as to defendant unions because of insufficient state involvement), nonetheless seemed to take for granted that a §1983 action would lie against a labor union if the defendant union were sufficiently cloaked with governmental authority or involved in activity with state officials. Driscoll v. International Union of Operating Engineers, 484 F.2d 682 (7th Cir. 1973), cert. den. 415 U.S. 960 (1973); El Mundo, Inc. v. Puerto Rico Newspaper Guild, 346 F.Supp. 106 (D. Puerto Rico 1972).

In Byrd v. Local Union No. 24, Int. Bro. of Electrical Workers, 375 F.Supp. 545 (D.C. Md. 1974) the Court's conclusion that it was not certain that defendant unions are not acting "under color of state law" justified its refusal to

dismiss proceedings against defendant unions for failure to state a claim under §1983. The Court plainly believed that a labor union was a "person" under the section. Byrd, supra, at 550. And, in Wackenhut Corp. v. Union De P. R., Loc. 901, 336 F.Supp. 1058 (D. Puerto Rico 1971) the Court plainly declared that the plaintiff may proceed against the union under §1983. Wackenhut, supra, at 1062.

Reference to 1 U.S.C. §1, Rules of Construction, makes clear the error of the UFT's construction.

> In determining the meaning of any Act of Congress, unless the context indicates otherwise --
>
> . . .
>
> the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals; [Emphasis supplied.]

42 U.S.C. §1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Nothing in the text of 42 U.S.C. §1983 remotely suggests anything other than the conclusion that a union is a person under the statute.

The Supreme Court in Allee v. Medrano, supra, has clearly indicated that, "[u]nions may sue under 42 U.S.C. §1983 as persons deprived of their rights secured by the Constitution and the laws, . . ." supra, at 2202, n. 13; American Fed. of State, Co. and Mun. Emp. v. Woodward, 406 F.2d 137 (8th Cir. 1969); Service Employees International Union v. County of Butler, Pa., 306 F.Supp. 1080 (1969). It would be monumentally inconsistent to conclude that the word "person" embraces a labor union in its second appearance in the single sentence section and excludes a labor union in its first appearance.

And, of course, there can be no doubt that an action may lie against a union for participating in discriminatory employment practices under 42 U.S.C. §1981. Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972); Arnold v. Consolidated Freightways, Inc., 399 F.Supp. 76 (S.D. Texas 1975); Holiday v. Red Ball Motor Frieght, Inc., 399 F.Supp. 81 (S.D. Texas 1974).

D. Plaintiff Has Sufficiently Alleged That the "UFT Defendants" Acted "Under Color of State Law" Within The Meaning of 42 U.S.C. §1983.

The memorandum of the UFT defendants at Point II, p. 34, argues that the union as a private entity and its members and officers as private citizens engaged in private actions are not reached by 42 U.S.C. §1983. Indeed, the memorandum correctly cites the general rule that "the statute deals only with those deprivations of rights that are accomplished under the color of the laws of any state or territory. It does not reach private conduct . . .," citing District of Columbia v. Carter, 409 U.S. 418 (1973), (decided on grounds that the District of Columbia was neither a "State" nor a "Territory). The general rule cited, however, is inapplicable to the factual allegations of the instant complaint. Further, with respect to the specific allegations of ¶31 of the Complaint (A. 16-22), it is perfectly clear, as it was to Judge Knapp, that these allegations constituted illustrations of a comprehensive and continuing course of conduct and that plaintiff's claim was not based on these incidents alone.

Ignoring the fair import of these and other allegations the UFT memorandum asserts that mere government regulation or some government participation in union affairs does not raise union activity to the level of "state action" subject to constitutional restraints. (Citing, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Driscoll v.

International Union of Operating Engineers, 484 F.2d 682 (7th Cir. 1973), cert. den. 415 U.S. 960 (1973); El Mundo Inc. v. Puerto Rico Newspaper Guild, 346 F.Supp. 106 (D.C. Puerto Rico 1972), among other cases.) Plaintiff, however, has not advanced these grounds to support his claim that the UFT defendants are liable under 42 U.S.C. §1983.*/

Rather, plaintiff has alleged concerted, interrelated and jointly engaged in activity by the UFT defendants and governmental defendants acting under authority conferred upon them by the laws of the State of New York and that that activity has inflicted injury upon the plaintiff.

Plaintiff has alleged in paragraph 30 of his complaint (A. 15) that "a program of harassment, interference and non-cooperation has been carried out through, by and at the instigation of the defendant members, officers and employees of the UFT, through, by and at the instigation of the defendant members of the Community School Board, through, by and at the instigation of defendant Acting District Superintendents Mersereau and Lurie, through and by defendant Chancellor Irving Anker and defendant members and employees of the Board of Education." Plaintiff has set forth numerous

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*/ The Supreme Court has held that 42 U.S.C. §1981 is applicable to private discriminatory acts, Tillman v. Wheaton-Haven Recreation Assn., Inc., 410 U.S. 431, 439-440 (1973).

specific actions (Complaint, ¶31) (A. 16-22) and the injuries he has suffered as a consequence of them (Complaint ¶¶31, 33, 34 (A. 22-23).

In support of his claimed "joint engagement" on the part of the private UFT defendants, plaintiff has alleged inter alia: that the defendant members of the Community School Board owe their positions to the financial and other support of the defendant UFT and that they are identified with the UFT and that this has, in fact, been acknowledged by this Court (Complaint, ¶¶15, 25) (A. 12) */ ; that defendant Roher, in an improper and illegal manner, named as acting Interim District Superintendent, defendant Leonard Lurie, an active and out-spoken supporter of the UFT (Complaint, ¶4) (A. 5); that the UFT dominated Board undertook a program of dismissal and harassment of district personnel who were either Puerto Rican or had supported the opposition slate (Complaint, ¶27) (A. 13); that an express threat was made to plaintiff by defendant officers and representatives of the UFT that a UFT associated Board member majority would create difficulties for plaintiff unless he "cooperated" (Complaint, ¶29) (A. 14) followed by the

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*/ In fact, in the most recent School Board election the UFT withdrew the support and endorsement of defendant Board member Kozlowsky, who recently had refused to conform her judgment to UFT policy. Kozlowsky was defeated in the election.

realization of that threat (Complaint, ¶30) (A. 15)*/ ; and, that UFT defendant representatives as well as UFT members, also employed by the Board of Education, acted specifically in furtherance of the program of harassment and interference (Complaint, ¶31(k), (l) and (n)) (A. 20-21). The activities of the UFT defendants in instigating and participating in the program and conspiracy of harassment, interference and abuse brings them within the coverage of 42 U.S.C. §§1981, 1983 and 1985(3).

Private parties, though not officials of the State who act in conjunction with State officials, can be liable under 42 U.S.C. §1983. Adickes v. S. H. Kress and Company, 398 U.S. 144, 152 (1970); Shirley v. State National Bank of Connecticut, 493 F.2d 739, 741 (2d Cir. 1974); Gillibeau v. City of Richmond, 417 F.2d 426 (9th Cir. 1969). "Private persons, jointly engaged with State officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State on its agents," United States v. Price, 383 U.S. 787, 794 (1966).

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*/ Following the recent elections in District One, defendant Carosella boasted to plaintiff that future grievance proceedings involving plaintiff would be decided against him at the Community level, i.e., by the Community Superinterdent to be appointed by the UFT controlled Board (see Affidavit of Raul Gonzalez, dated June 24, 1975) (A. 127).

Under applicable law, plaintiff has sufficiently alleged that the UFT defendants have acted "under color" of State law and are liable under 42 U.S.C. §1983. As Judge Knapp concluded, plaintiff's action against them under §1983 is properly before the court.

E. Plaintiff Has Sufficiently Alleged That the Defendants Engaged In and Had Knowledge of a Conspiracy Within the Meaning of 42 U.S.C. §1985(3).

The UFT brief at pages 46-50 argues that plaintiff has failed to allege facts to substantiate his claim that the UFT defendants engaged in a conspiracy to violate plaintiff's civil rights, or that the allegations "could rise to the level of a federal claim." Once again the defendants misconstrue the thrust of the complaint herein and of applicable law. Plaintiff's violated rights fall squarely within the coverage of the statute.

Section 1985(3) of the Federal Civil Rights Act sets forth a cause of action for a party injured as a result of a conspiracy by "two or more persons" for "the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities . . ." 42 U.S.C. §1985(3) (1964).

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) sets forth the elements of a cause of action under Section 1985(3):

> . . . a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another (2) for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of laws." It must then assert that one or more conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy, whereby another was (4a) injured in his person or property or (4b) deprived of having or exercising any right or privilege of a citizen of the United States.

Plaintiff has plainly alleged each of the requisite elements of a 1985(3) claim set out in Griffin. He has alleged a conspiracy among the defendants and an early threat by some of the defendants, of problems that would be created for him, satisfying element (1).

Element (2) is also satisfied. In explaining element (2), Justice Stewart, writing for a unanimous court, said:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirator's action. Supra, at 102.

Here plaintiff has alleged multiple instances in which, because he is a Puerto Rican, he has been discriminated against and subjected to unequal treatment. Furthermore, plaintiff has alleged that he has been subjected to this treatment because of his expressions of support for parent and community participation in public education, advocacy of bilingual programs, and support for a community supported slate of candidates in the school board elections. Support of political candidates and advocacy of ideas may place one in the clearly defined classes reached by Section 1985(3). See, Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971); Pendrell v. Chatham College, 370 F.Supp. 494 (W.D. Pa. 1974).

Plaintiff here has satisfied requirement (3) in Griffin by alleging in paragraph 31 of his complaint, inter alia, numerous acts by the defendants in furtherance of the object of the conspiracy. And, in claiming damage to his professional reputation and the deprivation of his right to equal protection of the laws, and rights of association and free expression, plaintiff fulfills the fourth requisite of Griffin.

In Adickes v. S. H. Kress and Company, supra, though apparently not pleaded under 42 U.S.C. §1985(3) but rather under 42 U.S.C. §1983, a conspiracy to refuse service to a white woman in the company of six young blacks and resulting in her arrest on a vagrancy charge was held actionable.

There, although the plaintiff conceded that "she had no knowledge of an agreement" between the private and public defendants, the Supreme Court appears to have accepted her contention that the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the non-circumstantial evidence of the conspiracy could only come from adverse witnesses, Adickes v. S. H. Kress and Company, supra, at 157.*/ See, Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971; Pendrell v. Chatham College, 370 F.Supp. 494 (W.D. Pa. 1974); Gillibeau v. City of Richmond, et al., 417 F.2d 426 (9th Cir. 1969); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Brewer v. Hoxie School District #46, 238 F.2d 91 (8th Cir. 1956); Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959).

Given the extensive specific allegations here (see Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946)), the permissive approach of the Supreme Court in Adickes to the pleadings under the Civil Rights Act and Rule 8, F. R. Civ. P., as construed by Conley v. Gibson, 355 U.S. 41 (1957)**/, and

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*/ See, Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) with regard to sufficiency of conspiracy pleadings under §1985(3).

**/ See page 45, infra.

the trend in recent decisions to "accord [to the civil rights statutes] a sweep as broad as [their] language," Griffin, supra, p. 97, plaintiff's Section 1985(3) claim was properly held non-dismissable by the Court below.

F. As to All "City Defendants" and In Connection With All Counts, Allegations of Sufficient Specificity Have Been Made.

With respect to defendant Anker and defendant members of the Board of Education, the complaint sets forth, at paragraphs 14 and 15 (A. 8-9) their broad responsibility in overseeing the public school system in the City of New York, and it is particularly noted, their responsibility to monitor the performance of the community boards and persons appointed and assigned by them. The complaint sets forth as well actions by these defendants as well as highly placed officials of the Central Board consistent with the "program of harassment, interference and non-cooperation," including the denial of a desperately needed painting of plaintiff's school (Complaint, ¶31(c)) (A. 17), as well as the refusal of defendants Lasser and Sousa to give to plaintiff needed assistance and cooperation ordinarily extended "to non-Puerto Rican principals and staff favored by the U.F.T." (Complaint, ¶31(h)) (A. 19) At paragraph 30 (A. 15), the complaint alleges that

the varied acts of "harassment, interference and non-cooperation" set forth in paragraph 31 have been carried out, among others, "through and by defendant Chancellor Irving Anker and defendant members and employees of the Board of Education." Additionally, the complaint alleges at paragraph 40 (A. 24) that, among others, these defendants, having knowledge of the conspiracy alleged and "some or all of the acts to be committed in furtherance of the object thereof, having the power to prevent or aid in preventing the same, neglected or refused to do so to plaintiff's injury."

The complaint sets forth at paragraphs 25 through 27 (A. 12-14) the continuing history of problems in the district and the acknowledged atmosphere of intense racial hostility prevailing therein, as well as the program of punishment and dismissal undertaken in the district by the UFT dominated Community School Board. It is inconceivable that defendant Anker and defendant Board of Education members are unaware of this history. It is submitted that given this history and their duties under the New York Education Law, these defendants had and have a special obligation of care and vigilance.

The Board of Education is a massive hierarchical bureaucracy. Its internal operations and the flow of authority and command within it are not generally the subject of revealing public scrutiny. Additionally, the Chancellor and the

Board must periodically renegotiate with the UFT defendants in this action the contract controlling the employment of most public school personnel. Given this relationship, the rights of individuals may well be overlooked occasionally in the interests of avoiding disharmony with the collective bargaining agent.

Against this background and the complexity of the factual pattern raised by the allegations of this complaint, it would have been error to dismiss as to these defendants at the pleading stage of this action.

> A case brought under the Civil Rights Act should not be dismissed at the pleadings stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968).

See also, Conley v. Gibson, 355 U.S. 41 (1957).

> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." Conley v. Gibson, supra, at 47.*/

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*/ "To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." Conley v. Gibson, 355 U.S. 41, 47 (footnotes omitted).

If at a later stage in the proceedings, it appears that there is no genuine issue as to any material fact, these defendants may move for summary judgment under Rule 56, F. R. Civ. P. As Judge Knapp held:

> In this case, the plaintiff has set forth facts showing intentional and purposeful deprivation of his civil rights, and has alleged with at least some degree of particularity overt acts by the defendants which he claims were reasonably related to the promotion of the claimed conspiracy. Such a showing is sufficient to withstand a motion to dismiss pursuant to Rule 12(b)(6). (citations omitted) (A. 152).

CONCLUSION

For the reasons set forth in this brief, the Memorandum and Order of Judge Knapp, dated July 31, 1975, denying the motions of defendants to dismiss this complaint should in all respects be affirmed.

Respectfully submitted,

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